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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-850

76-6951

JOHN WILLIAM HARRIS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No. A-850

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v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered December 27, 1976, rehearing denied January 20, 1977.

CITATIONS TO OPINIONS BELOW

The opinions of the Supreme Court of Ohio are reported at 48 Ohio St. 2d 351 and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3), petitioner having asserted below and asserting here deprivation rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Were Respondents due process rights and right to a trial by jury violated by the trial Court when the trial Court failed to abide by judicial standards in permitting jury waive trial and overruled Respondent's Motion for Mis-Trial and further when the

three judge panel failed to follow statutory requirements of jury waive trial.

2. Is Sociopathy a recognized mental disorder that the State should have considered as a mitigating factor to preclude imposition of the death penalty?

3. Were Petitioners due process rights abrogated by placing the burden of proof on the Petitioner in the mitigation hearing based on offender's psychosis?

4. Are Sections 2903.01, 2929.03 and 2929.04 of the Ohio Penal Code in violation of the constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the 5th, 6th, 8th and 14th Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law:

Ohio Revised Code, Section 2903.01. Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.
(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Revised Code, Section 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict

shall separately state whether the accused is found guilty or not guilty of the principal charge and if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of seciton 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement,he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D)of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Revised Code 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assissination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
(2) The offense was committed for hire.
(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, aommitted prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.
(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
(1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF FACTS

This matter is on appeal from the Supreme Court of Ohio in affirming the actions of the lower Courts in finding the Petitioner guilty of one count of aggravated murder with specifications of aggravation.

Subsequent to the affirmance of the herein conviction, a Notice of Appeal was timely filed in the United States Supreme Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief to the Supreme Court of Ohio, Petitioner alleged error in overruling the Petitioner's Motion to Suppress Petitioner's confession; the unconstitutionality of the Ohio Capital Punishment Statutes; error in overruling Petitioner's motion for a new trial based upon the improper and prejudicial circumstances surrounding the filing of the jury waiver; error in overruling Petitioner's motion for a new trial; and the unconstitutionality of Section 2929.04 (B) of the Ohio Revised Code. Each of these allegations was specifically rejected.

Petitioner's application for rehearing, in which the above mentioned contentions were again raised, was denied.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S DUE PROCESS RIGHTS AND RIGHTS TO A TRIAL BY JURY WERE VIOLATED BY THE TRIAL COURT NOT ABIDING BY REQUIRED JUDICIAL STANDARDS IN PERMITTING JURY-WAIVED TRIAL AND BY OVER-RULING PETITIONER'S MOTION FOR MIS-TRIAL WHEN THREE JUDGE PANEL FAILED TO FOLLOW STATUTORY REQUIREMENTS OF JURY-WAIVED TRIAL.

A. Under Ohio's criminal procedure rules, before commencement of trial, the Defendant may knowingly, intelligently and voluntarily waive his right to trial. (Note 1.)

During the entire trial, the Defendant had not signed a written waiver of trial by jury. If no written waiver of trial by jury existed when case went to trial, convictions were subject to reversal. (Emphasis added.) State v. Smith, 365 Atl. Rept. 2d 1036.

After the trial, the trial court discovered the jury waiver was not in the record. Defense counsel was ordered to secure a signed jury waiver. The Defendant signed the jury waiver at County Jail, not in the presence of the court. In order to be valid, a Defendant's waiver of his right to jury must be made personally in open court. People v. Scofield, 17 Cal.App. 3, 1018, 95 Cal.Rpt.405. (Exhibit 1 - Jury Waiver.)

At no point was the 17 hear old Defendant addressed personally by the Court to determine if he knowingly, intelligently and voluntarily waived his right to a jury trial. (Note 2. Transcript of Video Tape of Pre-Trial Hearing.)

Patton states emphatically that waiver of the right to a jury trial of twelve requires "the express and intelligent consent of the Defendant". (281 U.S. at 312, 50 S.Ct. at 263.)

(Note 1. CPR Rule 23.)
"(A) Trial by jury. In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.
(B) Number of jurors. In felony cases juries shall consist of twelve.

The note of the Advisory Committee on Rules state that Rule 23 (b) "is a restatement of existing practice, the constitutionality of which was approved in Patton v. United States. U.S. v. Guerrero Peraltz, 446 F.2d 876, 1971, 877, 2. Right to jury trial is fundamental right and waiver should not be presumed. U.S. v. Lee, 539 F.2d 606.

The Petitioner had entered a plea of not guilty by reason of insanity which should have alerted the Court to diligently inquire into the ability of the Petitioner to waive his rights to a jury trial. The procedures required in Section 1.2(b) of the ABA Standards For Criminal Justice, (Note 3.), should have been used as an additional safeguard against the possibility of the Petitioners involuntary waiver of his rights. State v. Irving, Kan.Sup.Ct. 4/5/75, 17 Cr.L. 2092.

The Petitioner does not base his constitutional violations on the procedural fact that the waiver was not signed before the trial. The thrust of his argument is substantive that he was never advised by the Court of the differences between jury and judge trials. Nor did the Court ever address him personally to determine if this was a voluntary decision or whether he was under duress or coercion to accept a judge trial. Nor did the Court even address him personally to determine if he could make an intelligent decision under the circumstances of being a 17 year old Defendant with little formal education. Nor did the Court even address him personally to determine if he had the required mental ability to waive a trial by jury. The Courts of Ohio have never addressed the thrust of the Petitioner's constitutional violations. Instead, its decisions were focused on the procedural matter of the writing and found such procedure to be a "narrow, hypertechnical point". The Petitioner submits that his basic substantive rights to a trial by jury were violated by the trial court. And the duty of the trial court in that regard is not to be

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Note 3.
"(b) The court should not accept a waiver unless the defendant, after being advised by the court of his right to trial by jury, personally waives his right to trial by jury, either in writing or in open court for the record."

discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. (Emphasis added.) Patton v. U.S., 281 U.S. 276.

B. The Petitioner submits that his Sixth Amendment rights to a fair trial were violated when the trial court did not follow the statutory procedure. The presiding judge of the trial court stated that the court in the instant case was operating under the rules that only the presiding judge was going to rule on matters of law and the other two members were merely jurors on the panel. Trial transcript 200. This ruling was in violation of O.R.C. 2945.06. If the two other members of the panel were merely triers of the fact, the Petitioner was deprived of having twelve triers of the fact. (Note 4.) A timely motion for a mis-trial was made. Thus, in effect, the Petitioner attempted to withdraw his waiver of jury trial and objected to his trial before the court prior to raising the issue on appeal. Scruggs v. State, 3-1173 A 156, 317 NE 2d 800, 805.

There was no showing that permitting the withdrawal of the panel would prejudice the legitimate interest of the prosecutor or court. The legitimate interest of the Petitioner was in a precarious position that should have been cured by the panel's relinquishment of its jurisdiction as the fact finder. By moving for a mis-trial, the Petitioner on the record created the issue as to the waiver being voluntary. People v. Murell, Ill. 46849, 326 NE 2d 762, 765.

(Note 4.) O.R.C. 2945.06

"In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and

reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code."

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER SOCIOPATHY IS A RECOGNIZED MENTAL DISORDER THAT STATE MUST CONSIDER AS MITIGATING FACTOR TO PRECLUDE IMPOSITION OF DEATH PENALTY.

The Courts of Ohio failed to address the issue of whether sociopathy should be recognized as a mental disorder that must be considered for mitigation as to the death sentence. The juvenile records of the Petitioner show that he was classified as a sociopath at the age of 13 by the Juvenile Court. The petitioner respectfully requests that this Court provide the Petitioner with a definitive answer as to whether the State of Ohio should now be permitted to take the life of an 18 year old sociopath who was never properly given any psychological or psychiatric help by the State of Ohio as a juvenile offender. Sister states have recognized the need to provide treatment for "defective delinquents". (Note 5.) If the Petitioner had been provided proper confinement and treatment by the State, he would not have been in his present position.

The purpose of this article is not the additional punishment for a crime which a conviction has been obtained, but the protection of an individual and society from a dangerous condition, of which the past commission of crime is one symptom, and the treatment of that condition which, in a separate proceeding, has been judicially determined to exist. Monroe v. Director, Patuxent.

(Note 5.) Maryland Code, Article 31 B, Section 5.

"A defective delinquent shall be defined as an individual who by demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity towards criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

The right to adequate treatment for mental disorders is included in the Eighth Amentment. Burchett v. Bowen, 355 F. Suppl. 1278, 1281, (U.S. D.C. Ariz. 1973). The crux of the question becomes "is sociopathy a mental disorder or mental disease that should be recognized by the court; not only for the right to have adequate treatment, but also for the right to have it be considered a mitigating factor is O.R.C. 2929.04(B)(3). (Note 6.)

The Appellant submits the proposition that a liberal instruction of the law defines a sociopath as one suffering from mental disease and thus falls into the ambit of O.R.C. 2929.04(B)(3) and should be precluded from having the death penalty imposed.

The Court is respectfully requested to review the following language from United States v. Currens, 290 F.2d 751, at 761. (Note 7.)

Note 6. O.R.C. 2929.04(B)(3)

"The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Note 7. United States v. Currens, at 761.

"We are aware that some jurists and legal scholars are of the view that, as a matter of law, a psychopath is not 'insane'. This view seems to be based on a fear that a rule recognizing that a psychopath may not be capable of possessing a 'guilty mind' would open the door to the acquittal of persons accused of crime solely on the basis of a history of recurrent antisocial conduct. It is readily apparent that this objection to the inclusion of psychopaths among those entitled to raise the defense of insanity assumes a particular definition of psychopathy; vix., that the term psychopathy comprehends a person who is a habitual criminal but whose mind is functioning normally. Perhaps some laymen and, indeed some psychiatrists, do define the term that broadly; and insofar as the term psychopathy does merely indicate a pattern of recurrent criminal behavior we would certainly agree that it does not describe a disorder which can be considered insanity for purposes of a defense to a criminal action. But, we are aware of the fact that psychopathy, or sociopathy, is a term which means different things to experts in the fields of psychiatry and psychology. Indeed, a confusing welter of literature has grown up about the term causing some authorities to give up its due in dismay, labelling it a 'waste basket category.' See, e.g. Patridge, C. E., Current Conceptions of Psychopathic Personality, 10 American Journal of Psychiatry, pp. 53-59 (1930).

We have examined much of this literature and have certainly found it no less dismaying than those authorities to which we have just referred. Our study has, however, revealed two very persuasive reasons why this court should not hold that evidence of psychopathy is insufficient, as a matter of law, to put sanity or mental illness in issue. First, it is clear that as the majority of experts use the term, a psychopath is very distinguishable from one who merely demonstrates recurrent criminal behavior. For example, Dr. Winfred Overholser, Superintendent of Saint Elizabeths Hospital in the District of Columbia, has stated that the Hospital takes the unequivocal position that sociopathy is a mental disease. Dr. Overholser in stating that this is the position of the Hospital uses the words 'the Hospital' in

the same sense that a judge uses the term 'the court' in expressing the judgment of his tribunal. Moreover, the American Psychiatric Association in 1952 when it published its Diagnostic and Statistical Manual, Mental Disorders (Mental Hospital Service), altered its nomenclature, p.38, removing sociopathic personality disturbance and psychopathic personality disturbance from a non-disease category and placing them in the category of 'Mental Disorders.' See also note 11, cited to the text, p.16 in the concurring opinion of Judge Burger in Blocker v. United States. D.C. Cir. 1961, 288 F.2d 853.

One of the most respected, perhaps the leading, modern works on psychopathy is The Mask of Sanity by Herbey Cleckley, M.D. (Mosby 1941). Dr. Cleckley's findings are best summarized in Professor Robert W. White's, The Abnormal Personality (Ronald Press 1948) at p.401 as follows: 'He [Cleckley] rules out those cases in which social standards are rejected only in respect to some one particular kind of behavior: for example, alcoholism or deviant sexual behavior in a person otherwise adapted to social demands. He also rules out those cases in which delinquency and crime have been adopted as a positive way of life -- in which the person is an enemy of society but is capable of being a loyal and stable member of a delinquent gang. There remains a group characterized by a diffuse and chronic incapacity for persistent, ordered living of any kind. These are, in Cleckley's view, the true psychopathic personalities. They need not be diagnozed negatively, by exclusion of other possibilities. They constitute a true clinical entity with a characteristic pattern of symptoms.' After some discussion, Professor White concludes at p.404: 'It is clear that we are dealing with a fairly serious disorder. There are grave disturbances in the patient's affective life as well as in foresight and the control and organization of behavior. Cleckley considers the condition serious enough to be classed as a psychosis. Although the patient outwardly presents a 'convincing mask of sanity' and a 'mimicry of human life,' he has lost contact with the deeper emotional accompaniments of experience and with its purposiveness. To this extent he may be said to have an incomplete contact with reality, and it is certainly very hard to approach him and influence him therapeutically.'

Thus, it can be seen that in many cases the adjective 'psychopathic' will be applied by experts to persons who are very ill indeed. It would not be proper for this court in this case to deprive a large heterogeneous group of offenders of the defense of insanity by holding blindly and indiscriminately that a person described as a psychopathic is always criminally responsible.

(7) Our second reason for not holding that psychopaths are 'sane' as a matter of law is based on the vagaries of the term itself. In each individual case all the pertinent symptoms of the accused should be put before the court and jury and the accused's criminal responsibility should be developed from the totality of his symptoms. A court of law is not an appropriate forum for a debate as to the meaning of abstract psychiatric classifications. The criminal law is not concerned with such classifications but with the fundamental issue of criminal responsibility. Testimony and argument should relate primarily to the subject of the criminal responsibility of the accused and specialized terminology should be used only where it is helpful in determining whether a particular defendant should be held to the standards of the criminal law."

The concurring opinion of Judge Burger in Blocker v. United States, D.C. Cir.1961, 288 F.2d 853 reads as follows: (Note 8.)

Note 8. Blocker v. United States, Concurring opinion of Judge Burger.

"We can take judicial notice that the American Psychiatric Association altered its nomenclature in 1952 to change psychopathic personality disturbance

from a non-disease category into a mental disease. Whether this way by 'voice vote' at a convention or some other parliamentary process we are not informed. The medical literature suggests that a large number, perhaps even a majority of psychiatrists do not consider 'psychopathic personality disturbance' a mental disease.

In his recent Isaac Ray Award book The Criminal Mind (1958), Dr. Roche tells us:

'Psychiatric nomenclature is undergoing revision and there is considered the possibility of discarging the terms 'psychosis' and 'neurosis' altogether in favor of a more flexible framework in keeping with our present knowledge and operational methods * * * It would be of interest to the legal profession that the term 'psychopathic personality' is no longer regarded by psychiatry as meaningful, yet it will probably remain embalmed for some time to come in the statutes of several States. * * * Id. at 25.

On the preceding page of the same work the author has already told the reader that

'Two of the most frequently encountered terms in psychiatry are 'psychosis and psychoneurosis' ('neurosis') and it might appear that in such currency their meaning should be settled in universal agreement. This is not the case. Not only is there confusion, theoretically and practically, as to the precise meaning of each term, but also there is often as much confusion as to the existence of a pathological process to which either or both terms can be applied.' Id. at 24-25."

The State of Ohio has long recognized that a psychopathic (sociopathic) offender should be committed to the department of mental health. O.R.C. 2947.25(D)(2). (Note 9.) The logical deduction is that the State of Ohio has also recognized that a sociopath is mentally defective, or mentally deficient.

A review of the psychological tests of John Harris reveals that the State of Ohio was aware of his sociopathic condition since he was 13 years old. At that time and during subsequent periods, John Harris was under the control of the State of Ohio, but the State permitted him to return to

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Note 9. O.R.C. 2947.25(D)(2)

"Impose the appropriate sentence for the offense of which the person was convicted. At the same time the court shall enter an order of indefinite commitment of such person to the department of mental health and mental retardation, during the continuance of which the execution of sentence shall be suspended. Thereupon such person shall be sent to an appropriate institution designated by the department. If the department, because of lack of facilities, fails to designate an appropriate institution, such person shall be sent to the institution to which he would have been sentenced had he not been adjudged mentally ill, a mentally retarded offender, or a psychopathic offender. Such orders of indefinite commitment shall show the offense of which such person was convicted and the minimum and maximum penalties therefor. Certified copies of said order and the reports of the examiners, unless submitted by the department, shall be sent to the department. Every order of indefinite commitment is a final order."

society without placing him under the control of the Department of Mental Health, or provide him with any other psychological assistance to control the personality described in 2947.24B, Psychopathic Offender:

"Psychopathic offender" means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies, and who by reason thereof is a menance to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control."

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER STATE OF OHIO DENIED PETITIONER DUE PROCESS RIGHTS BY PLACING BURDEN OF PROOF ON PETITIONER IN MITIGATION HEARING BASED ON OFFENDER'S PSYCHOSIS.

The Petitioner was examined by two appointed psychiatrists for the purpose of the mitigation procedure authorized by O.R.C. 2929.04. (Note 10.) He was also examined by Dr. James Raia, a clinical psychologist. The report submitted to the court indicated that the patterns exhibited by the Petitioner are frequently diagnosed as schizophrenic, paranoid type. (Exhibit 2 - Report of James Raia, PHD, Clinical Psychologist.)

The petitioner submits that he was deprived due process by requiring him to prove to the trial court's satisfaction that he suffered from schizophrenia-paranoia. Once there is some evidence contesting the petitioner's sanity, the state must prove beyond a reasonable doubt that the Petitioner did not have the requisite mental capacity to fall within the ambit of O.R.C. 2929.04 (B)(3). Grace v. Hopper, USDC M. Ga. 2/2/77, 20 Cr.L. 2519. (Note 11.)

Note 10. O.R.C. 2929.04(B)(3).

See Note 6, supra.

Note 11. Grace v. Hopper, USDC M Ga. 2/2/77, 20 Cr.L. 2519.

"In Davis v. U.S., the Court held that in federal criminal trials the prosecution must prove every essential element of the crime charged, including the mental capacity of the defendant, beyond a reasonable doubt. In Leland the Court refused to reach the same conclusion with respect to state prosecutions.

However, in In re Winship, the Court, after discussing both Davis and Leland, among other cases, concluded 'that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' Winship was amplified and further explained in Mullaney v. Wilbur.

[Text] After reviewing the historical development at common law and in this country of the elements of murder and manslaughter and after specifically pointing out that the Supreme Court in 1895 in Davis v. U.S., a review of a lower federal court case, had already unanimously rejected the concept of malice which requires a defendant to negate malice aforethought by proving by a preponderance of the evidence that he acted in the heat of passion so as to cause him to be convicted of manslaughter rather than murder, the [Mullaney] court stated (1) that almost from the inception of the law of homicide the presence or absence of heat of passion on sudden provocation 'has been the single most important factor in determining degree of culpability attaching to an unlawful homicide' and (2) 'the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.' Id. at 696.

The court discussed and rejected the state's argument that In re Winship should be applied only to those facts which, if not proved, would wholly exonerate the defendant and further argument that heat of passion on sudden provocation is not a fact necessary to constitute the crime of murder in Maine. [End Text]

In refusing to apply Winship and Mullaney v. Wilbur to Grace's case, the Georgia Supreme Court agreed that the prosecution must prove all elements of the crime charged. It noted, however, that 'sanity has not been treated as a critical essential element of the offense which the prosecution is required to prove beyond a reasonable doubt.' The Georgia court also thought it significant that Leland was not specifically overruled in Winship or Mullaney v. Wilbur, and noted that Justice Rehnquist, joined by the Chief Justice, stated that they saw no inconsistency between Mullaney v. Wilbur and Leland.

This court notes that the possible inconsistency was not an issue in the case and further points to the discussion in footnote 31 of the Court's opinion discussing the due process implications of evidentiary devices such as presumptions and inferences that have the effect of shifting the burden of proof to the defendant. See n.31, 17 CrL at 3069.

[Text] Under Georgia law as construed heretofore by the Supreme Court of Georgia in its said denial of petitioner's writ of habeas corpus, sanity is not an element that must be proved by the State to establish the crime of murder because as the trial court charged petitioner's jury 'under the law of this state every person is presumed to be of sound mind and discretion...,' and '... the acts of a person of sound mind and discretion are presumed to be the product of that person's will...'***. Nevertheless the absence of a sound mind and discretion the same as being under 13 years of age, involuntarily intoxicated or laboring under a misapprehension of fact, Ga. Code Ann.

§§260701, 704 and 705, eliminates all responsibility under the laws of Georgia for murder as well as all other crimes.

Under the law of Maine the evidence as to which the burden of proof was placed upon a defendant had the effect of reducing the crime charged from that of murder to that of manslaughter thereby diminishing the maximum possible punishment from life imprisonment to imprisonment for 20 years. Under the law of Georgia evidence of legal irresponsibility on account of lack of mental capacity -- herein and elsewhere commonly called insanity -- as to which the burden of proof was placed upon petitioner Grace, as the much greater effect of not just reducing the crime of murder and its then possible punishment of life imprisonment to some lesser crime and punishment but completely eliminating all criminal charges and all possible criminal punishment for the act in question.

To paraphrase the Supreme Court's concluding paragraph in Mullaney, Georgia law requires a defendant to establish to the reasonable satisfaction of the jury that he lacked mental capacity and therefore cannot be found guilty of murder or any other crime. Under this burden a defendant at the time of petitioner's alleged crime could be given a life sentence -- now could receive capital punishment -- in the courts of this state when the evidence indicates it is as likely as not that he deserves to be found to be not criminally responsible on account of lack of mental capacity to commit any crim.***

It is therefore this court's opinion that the Due Process Clause as interpreted and applied by the Supreme Court of the United States requires the prosecution in the courts of the State of Georgia when there is some evidence contesting the mental capacity of the defendant to be convicted of the crime of murder or any other crime, to prove beyond a reasonable doubt that the defendant has the mental capacity required by Georgia law to be convicted of murder or any other crime."

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER SECTIONS 2903.01, 2929.03 AND 2929.04 OF THE OHIO PENAL CODE PERMIT ARBITRARY IMPOSITION OF THE PUNISHMENT OF DEATH IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

In July of 1972 the Supreme Court of the United States held that the death penalty could not be imposed or carried out under statutory schemes which permit arbitrary, rare and discriminatory application. Furman v.Georgia 408 U.S. 38 (1972). Two of the five majority justices found the death penalty unconstitutional per se. The remaining three justices based their holdings upon the sentencing discretion conferred by the typical pre-Furman capital punishment statute and did not decide whether the removal of sentencing discretion, or the removal or control of discretion at other stages of the capital trial process, would sufficiently regularize the imposition of capital punishment to satisfy constitutional standards against arbitrariness, rarity and discrimination in infliction of the punishment of death.

By enactments effective January 1, 1974 the Ohio Legislature provided new capital punishment measures that defined a category of murder cases in which the penalty is potentially applicable that purport to regulate the process by which sentence is determined in cases of capital murder. But the conclusion is inescapable that, under this new legislation, the death penalty does and will continue to be imposed in an arbitrary, rare and discriminatory manner. It is, hence, unconstitutional under the terms of the Furman decision. (See Sections 2903.01, 2929.02, 2929.03, 2929.04 of the Ohio Revised Code.)

A close review of the aforementioned legislation indicates that persons who commit capital murder may be sentenced

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to death or life imprisonment depending upon the outcome of several decision-making processes. Some of these decisions are made on a discretionary basis. Others are made under the disguise of resolving subjective and conclusionary questions which function - and are intended to function - to mask the true, discretionary character of the decision-making.

Examples of this, under the new legislation, are the exercise of prosecutorial discretion, plea bargaining, jury discretion, and sentencing discretion. Although it is clear that Furman directed itself primarily to sentencing discretion, it is apparent that pre-sentence and post-sentence discretion can operate just as well to make the eventual imposition of capital punishment arbitrary and capricious. This decision has been reached in two states where courts have so held and have, therefore, invalidated supposedly mandatory death sentencing statutes on the authority of Furman. In Commonwealth v. A Juvenile (1973) Mass. Adv.Sh. 1199, 300 N.E. 2d 434 (1973), a death penalty imposed pursuant to a statute which required its imposition upon a conviction of a rape-murder was reversed because the trial judge had absolute discretion to avoid the penalty by proceeding against the Defendant under the Massachusetts Juvenile Offender Statutes. In New Mexico it was held in State v. Sanford (No. 24022 Cr., Bernalila County,) that a death penalty could not lawfully be imposed, even if it were mandatory upon conviction of first degree murder, if "indictment would allow the jury to choose between first or second degree murder" because the jury would thereby be "allowed to arbitrarily decide whether a defendant shall receive the death penalty by choosing either first or second degree murder."

Similarly, the Ohio legislation is defective for the reason that the legislation has failed even to make an attempt

to regulate discretion operating in an arbitrary manner and with equal or greater effect before and after the imposition of sentence.

As to prosecutorial discretion, "the prosecutor is the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts." (National Commission on Law Observance and Enforcement, Report on Prosecution (1931). The impact of prosecutorial discretion on the administration of criminal justice is unbounded:

> " Whom he chooses to prsecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."
> (Note, Prosecutorial Discretion 21 DePaul L.Rev. 485, 486 (1971-1972).

Thus, without any legislative guidance whatsoever, a prosecutor may make case-by-case decisions as to whether an indictment will be sought for aggravated murder or for a lesser crime. Thus, since prosecutorial discretion is unlimited in Ohio there is no safeguard against the possibility that defendants will be charged with capital murder while other defendants, in identical or near identical factual situations, are charged with a lesser offense. (ORC. Section 309.08)

In addition, Sections 2929.03 and 2929.04 introduce an entirely new and equally unregulated level of prosecutorial discretion by providing that the death penalty may only be imposed if the prosecutor has chosen to specify in an indictment charging aggravated murder that one of the seven conditions enumerated in Section 2929.04 was present. Absent such a specification, no death sentence is possible regardless of the facts proved at trial; yet no rule of law and no amount of evidence places a prosecutor under any duty to allege or prove such a condition. It is, therefore, possible for a prosecutor

to try an alleged murderer for the highest degree of the crime, but to choose, for any reason at all, or for no reason at all, not to seek a death penalty.

Even if the initial charging discretion of prosecuting attorneys were somehow regularized, their power to avoid the death penalty by accepting a plea of guilty or no contest to a lesser included offense or to aggravated murder without specified aggravating circumstances would remain unchecked. See Rule 11(C)(4) of the Rules of Criminal Procedure which provide that"if the indictment contains one or more specifications, and a plea of guilty or no contest to the charges accepted, the Court may dismiss specifications and impose sentence accordingl in the interests of justice." The prosecutor and judge are thus given absolute discretion to avoid the death penalty since that penalty is prohibited in the absence of a plea or judicial finding of one or more specifications.Under 48 (A) of the Rules of Criminal Procedure the prosecuting attorney may exercise the same discretion by obtaining, with permission of the Court, a dismissal of all or part of the indictment. Thus, it becomes inevitable that in the absence of any standards which would prevent a prosecuting attorney from accepting a guilty plea to a lesser charge, some defendants indicted under the Ohio Capital Punishment Statutes will escape through plea-bargaining, the ultimate penalty of death. In the case at hand, in response to a question posed by the attorneys for the Defendant-Appellant, James O'Grady, chief trial counsel for the prosecutor's staff, admitted that discretion could exist, in fact, he stated that it has to exist. (T-48-49)

The third area where discretion is exercised is through the jury process. Juries have traditionally avoided the death

penalty by convicting defendants of lesser, rather than capital offenses. Indeed, American juries called upon to determine cases which the death penalty was mandatory upon conviction have frequently refused, despite strong evidence of guilt, to return a guilty verdict with regard to the capital offense. See McGautha v. California 402 U.S. 183, at 199 (1971), and authorities cited therein. The new death penalty provisions of the Ohio Criminal Code do nothing to regularize pre-existing jury discretion to convict a capital defendant of a lesser offense. Moreover, they offer the jury the additional opportunity to avoid the death penalty by finding the defendant guilty of aggravated murder but failing to find that the offense involved, a specified aggravating condition.

Any of seven circumstances will, if found by the jury to have existed beyond a reasonable doubt, serve to elevate a crime from the category of simple aggravated murder (carrying a maximum penalty of life imprisonment) to the category of capital murder (punishable by life imprisonment or death). These seven circumstances are decidedly more susceptible of objective determination than the mitigating circumstances enumerated in Section 2929.04(B), yet each is an invitation to a jury opposed to the execution of the defendant before it to remove the capital punishment alternative by failing to find the presence of a specified aggravating circumstance.

This new opportunity for discretion embellishes a system in which the opportunity of convicting a capital defendant of a lesser offense is clearly available (R.C. Section 2945.74).

The last area of discretion to be discussed and the plainest result of Furman is that sentencing discretion may no be exercised to impose the death penalty upon some, but not all persons found to have committed capital crimes. The post-Furman

Ohio statutes provide that even after a defendant found to have commited an aggravated murder under one of the seven conditions specified as prerequisite to the imposition of the death penalty, the trial judge may sentence him to death or to life imprisonment depending upon a determination of three highly subjective questions of degree, none of which can be precisely proven. These mitigating circumstances as they are called, are so imprecise that they assure absolute sentencing discretion by providing a rationale for the choice of either sentencing alternative in almost any capital case.

In Gregg v. Georgia, 44 U.S.L.W. 5230 (July 2, 1976); Proffitt v. Florida, 44 U.S.L.W. 5256 (July 2, 1976); Jurek v. Texas, 44 U.S.L.W. 5262 (July 2, 1976); Woodson v. North Carolina, 44 U.S.L.W. 5267 (July 2, 1976; and Roberts v. Louisiana, 44 U.S.L.W. 5281 (July 2, 1976), the Supreme Court of the United States considered the per se constitutionality of capital punishment and decided that "the punishment of death does not invariably violate the Constitution," Gregg v. Georgia, supra, 44 U.S.L.W. at 5234. In so doing, it rejected petitioners' contention that support for the death penalty had so dwindled that its imposition in a predictably small number of scattered cases would be an impermissible cruelty. The Court acknowledged that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5272, and held that, even where the death penalty was limited to a narrower category of homicides, its across the board imposition, without regard for "the circumstances of the particular offense and the character and propensities of the offender" involved "harshness and inflexibility," Roberts v. Louisiana, supra, 44 U.S.L.W. at 5283, that were inconsistent with contemporary moralty as evidenced by legislative enactments and the behavior of capital juries. But it took the position that where the attention of the sentencing body is focused upon both aggravating

and mitigating factors, and where appellate review of capital sentences is available as an assurance against disproportionality, Gregg v. Georgia, supra, 44 U.S.L.W. at 5243, see also Proffitt v. Florida, supra, 44 U.S.L.W. at 5259; Jurek v. Texas, supra, 44 U.S.L.W. at 5266, a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,'" -- a factor found decisively lacking in Furman v. Georgia, 408 U.S. 238 (1972) -- would be achieved. Gregg v. Georgia, supra, 44 U.S.L.W. at 5243.

The decisions in Gregg, et al. rest, then, on the assumptions that (1) contemporary levels of support for the death penalty are not so low that its use will be necessarily aberrational, and (2) as standards of decency evolve, legislative patterns permitting or mandating lesser penalties in formerly capital cases and patterns of jury behavior in capital cases will emerge, providing rational bases for identifying systems that are excessively rigid and sentences that are disproportionately harsh.

Furman v. Georgia, due to its complexity, has been applied in Ohio capital cases to severely limit mitigating circumstances. These rigid features of the Ohio Statute are clearly inconsistent with legislative will and therefore are in violation of the constitutional rationale of Gregg, et.al.

Woodson v. North Carolina, supra, and Roberts v. Louisiana, supra, hold that contemporary standards of decency, incorporated in the Eighth Amendment, require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and forbid "treat[ing] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Moreover, they

establish that recent legislative enactments of statutes allowing rigid, automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction capital punishment.

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and Roberts, are more rigid than contemporary standards of decency can condone and reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman.

Following Furman, 21 of 35 states that enacted new sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. The federal government and 11 states enacted statutes following the example of the Model Penal Code of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case. These twelve jurisdictions, finding the mandatory scheme too harsh, choose to focus sentencing deliberations upon a broad range of mitigating factors. The mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors having to do with " the character and record" of the defendant whose life is at stake. For the consideration of the herein case it is of particular importance to consider that in Colorado and Connecticut and under federal law, a finding that the defendant was under eighteen is an absolute bar to imposition of a death sentence. The record is clear that the Appellant was younger than eighteen at the time of this alleged or aggravated murder.

In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disburbance may be considered as a mitigating factor. Ala. H.B. 212 Sec. 7 (b); Ark. Code §41-4712 (a); Fla. Stat. Ann. §921.141(7)(b); Neb. Rev. Stat. §§92-2523 (2)(b) and (c). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. In Ohio, sentencing determinations in capital cases were taken from the jury and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency....."

Ohio Rev. Code §2929.04 (B)(3). The terms "psychosis" and"mental deficiency" designate narrow categories of mental illness and exclude most recognized mental and emotional disturbances. This rigid standard violates the principals that not "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender," see Roberts v. Louisiana, and that "individual culpability is not always measured by the category of crime committed," and thus infringes the constitutions of the United States and the State of Ohio. Since mitigating evidence is irrelevant to the Ohio sentencing determination, except as it establishes the inducement, duress, cohersion, strong provocation or causily related psychosis or mental deficiency that must be found to have inhered in the crime before a defendant may be spared, and since there is no mitigating factor that looks exclusively to the propensities and redeemability of the individual offender, the Ohio statute precludes the independent "consideration of the character and record of the individual" that is "a constitutionally indispensable part of the process of inflicting the penalty of death, "Woodson v. North

Carolina, 44 U.S.L.W. at 5275.

The Ohio Death Penalty statutes violate the sixth, eighth and fourteenth amendments in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death. Prior to Furman v. Georgia, 408 U.S. 238 (1972), it was almost universal in America that "infliction of the death penalty" be put "in the hands of the jury, rather than the judge." McElroy v. United States, 361 U.S. 249, 255 (1960) In fact,"except for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U.S. 183, 200 n. 11 (1971).

In Ohio, jury discrection in capital sentencing prevailed from 1898 without interruption until the death penalty statutes of this state were invalidated in 1972. This undoubtedly was the result of language in Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited and the opinion of the Supreme Court in McGautha, that the formulation of standards to guide juries in capital sentencing process was impossible.

The United States Supreme Court has not conceded that "McGautha's assumption that it is not possible to devise standards to guide and regularized jury sentencing in capital cases has been undermined by subsequent experience." Gregg v. Georgia 44 U.S.L.W. 5230, 5242 (1976).

Although it may be permissable to permit trial judges to reduce death sentences imposed under the influence of passion or prejudice or against the weight of aggravating and mitigating evidence, the imposition of a death penalty under a procedure which affords no opportunity for meaningful jury input is, on

three independent grounds, violative of the Ohio and Federal constitutions. First, the principle that Death Sentences may only be imposed by a jury is fundamental to our jurisprudence and an essential assurance against disproportionality and excessiveness in capital sentencing. Second, the failure to provide for jury input in the capital sentencing process will result in the impermissably arbitrary imposition of the death penalty. Third, findings regarding the presence or absence of mitigating circumstances are findings of fact as to which a defendant has a Sixth Amendment right to a trial by jury.

The final argument to be asserted by the Defendant-Appellant as to the unconstitutionality of the death penalty is that to execute a juvenile is cruel and unusual punishment as prohibited in the Eighth Amendment of the United States Constitution. The landmark case of Jordan v. Fitzharris 257 Fed. Supp. (1964), lists among other things that a punishment is cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim. Further, a punishment is unnecessarily cruel when it goes beyond the purpose for which it is used. In People v. Mosely, 15 Crim.Law, 2503, a recent New York State decision, the life sentence of a person convicted of selling narcotics was reversed as cruel and unusual punishment based upon a comparison with the punishments accorded similar crimes in other jurisdictions and the recommended penalty of model legislation. Following this decision, this Court is respectfully requested to compare the pertinent Ohio Statutes to those of New York, California, Rhode Island and Massachusetts. The Massachusetts Court, in Commonwealth v. A Juvenile, supra, holds that although the crime was heinous, the court could not execute since the accused was a juvenile when the crime was committed. The factual situation in this particular case is not unlike the one

posed in State v. Harris. The Massachusetts case also involves a juvenile felon whose initial hearing was before a juvenile court judge. The lower court in the instant case ruled that the juvenile court judges' discretion is sufficiently regulated as to render it acceptable under the terms of Furman. We ask this Court to review the Massachusetts case herein cited to suggest that the lower court's conclusion is not supported in law.

In the foregoing we have shown that the new capital sentencing procedure created by the new Ohio Legislature creates the jury selectivity which is condemned by Furman v. Georgia. Even if this were not so, the Eighth Amendment would prohibit Defendant-Appellant's death sentence, for today the death penalty, in any form, is inconsistent with the self-respect of a civilized people.

The Eighth Amendment is not static, and the prohibitions of the cruel and unusual punishment clause are not "confined to such penalties and punishments as were inflicted by the Stuarts. Weems vs. United States 217 U.S., 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." id at 378, and informed by "the light of contemporary human knowledge." Robinson vs. California 370 U.S. 660, 666 (1962). The penalty of death is, for three principal reasons, unjustifiable in terms of contemporary knowledge and standards of decency.

FIRST: The cruelty of the death penalty is apparent in an age when "contemporary human knowledge" draws upon advance medical science and sciences of human behavior. We are no longer so naive as to the workings of anti-social behavior as to uphold the simplistic notion that the threat of death deters crime. e.g. Sellin, Capital Punishment (1967) 135-186, 244-253;

Mattick, The Unexamined Death (1966) 28-80; Bedau, The Death Penalty in America, Rev.ed 1967 214, 258-343, Royal Commission on Capital Punishment, 1949-1953 Report (H.M.S.O., 1953) at 18-24, 58-59, 328-380; President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, to reinforce moral standards or, if retribution is considered a legitimate aim of penal sanction to exact a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human-life." Black, Crisis in Capital Punishment, 31 MD.L.Rev. 289-291 (1971) The death penalty is not consistent with any "standards of decency that our society can forthrightly accept." See Trop v. Dulles, 356 U.S. 86, 100 (1958).

SECOND: The death penalty should be repudiated because of its irregular and rare use. "The most salient characteristic of capital punishment is that it is infrequently applied... All available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967), p. 143. No man or woman has been executed in the United States of America since 1967.

The Furman majority looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "the objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U.S. at 300.

THIRD: The last and most obvious argument to be propounded against the application of the death penalty as violative of the Eighth Amendment of the United States Constitution is well stated in People v. Anderson, 6 CAL 3rd, 628, 493, P. 2d 880, 894 (1972). In this case it was pointed out, that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. It is plain that the prisoner, even more than the ex-patriot, is subjected to 'a fate of ever-increasing fear and distress.'" Trop v. Dulles, 356 U.S. 86, 102 (1958). The stress of awaiting execution frequently produces insanity; see Solesbee v. Balcome, 339 U.S. 914 (1950), or other extreme manifestations of psychological complications.

To summarize, the moral development which has accompanied advances in understanding the causes of crime and which is mirroed in the world-wide reluctance to impose the ultimate penalty, forbids its continued approval by courts constrained to maintain "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958).

CONCLUSION

Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

TIMOTHY D. GERRITY
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Columbus, Ohio 43215

MYRON SHWARTZ
50 West Broad Street
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio was served upon George C. Smith, Franklin County Prosecutor's Office, 369 S. High Street, Columbus, Ohio 43215, by ordinary U.S. mail this _____day of June, 1977.

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THE STATE OF OHIO, APPELLEE, *v.* JOHN WILLIAM HARRIS, APPELLANT.

[Cite as State v. Harris (1976), 48 Ohio St. 2d .]

Criminal law—Aggravated murder—Imposition of death penalty—Criteria—Constitutionality—Waiver of right to jury trial—Crim. R. 23(A)—Procedural requirements satisfied, when.

1. Ohio's statutory framework for the imposition of capital punishment is a valid constitutional enactment of law and does not violate the Constitution of the United States or of the state of Ohio. (*State* v. *Bayless*, 48 Ohio St. 2d 73, approved and followed.)
2. Where a defendant and his counsel waive the right to a jury trial and the cause is tried to a completion before a three judge panel, whereupon it is discovered that there is no written waiver as provided for in Crim. R. 23 (A), and the defendant and counsel promptly execute a written waiver, such action satisfies the procedural requirements of the rule.

(No. 75-843—Decided December 27, 1976.)

APPEAL from the Court of Appeals for Franklin County.

In the early morning hours of May 9, 1974, at a vacant lot near Maryland Ave. and Sunbury Road in the city of Columbus, Jeannette Nichols died after being shot in the head at close range with a .20 gauge shotgun. She had been abducted a few hours earlier from the parking lot at St. Anthony's hospital by four men, including John Harris, appellant herein. These men and one other, Baxter Martin, raped her and otherwise sexually abused her in and near the home of the appellant, robbed her and stole her automobile. She was killed by Harris in the presence of Jerome Royster, another of the men, who first acted as a lookout and then assisted Harris in covering the body with a discarded couch.

Although apparently directed not to take Mrs. Nichols' credit cards, Martin did so and his indiscreet use of one of them led to the identification of all the assailants. Upon the discovery that the police authorities had recovered the victim's body and had knowledge of their criminal involvement, the original four fled to Philadelphia, Pennsylvania. The appellant and Royster contacted their Columbus lawyer who advised them to surrender and say nothing. For whatever reason, they did not surrender, but were apprehended by the Philadelphia police on information relayed to them by Columbus police whose source was the driver of the automobile that transported them to Philadelphia.

Appellant was returned to Columbus where he was placed in the custody of the juvenile authorities, being of age 17 years and 9 months at the time. After an investigation and hearing, his matter was transferred for criminal prosecution as an adult.

The grand jury of Franklin County returned an indictment charging appellant with two counts of aggravated murder with specifications, and with kidnapping, rape, aggravated robbery, and grand theft.

On September 23, 1974, appellant, having waived his right to a jury trial, was tried by a panel, consisting of

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three judges of the Franklin County Common Pleas Court. The manner in which the jury trial was waived later became a subject of dispute. Also, on the first day of trial, the appellant, by his attorneys, entered a plea of not guilty by reason of insanity in addition to his not guilty plea.

After opening statements by both sides, a voluminous stipulation encompassing the testimony of at least 26 witnesses and 40 exhibits, previously agreed upon, was read into the record by the prosecutor.

On September 27, 1974, the three judge panel found appellant guilty as charged in the indictment, and ordered a pre-sentence investigation and psychiatric examinations.

On November 8, 1974, pursuant to R. C. 2929.03(D), a mitigation hearing was held, at which none of the mitigating circumstances under R. C. 2929.04(B) were found to be established by preponderance of the evidence.

The court elected to sentence the appellant on the first count of the indictment and imposed the death penalty. In addition, terms of years were meted out for counts 3, 4, 5 and 6.

A motion for a new trial was subsequently overruled, and upon appeal, the Court of Appeals affirmed the trial court's judgment.

The cause is now before this court as a matter of right.

Mr. George Smith, prosecuting attorney, and *Mr. Alan C. Travis*, for appellee.

Mr. Myron Schwartz and *Mr. Timothy Gerrity*, for appellant.

CELEBREZZE, J. Initially, appellant takes issue with the trial court's denial of the motion to suppress his statements. Counsel for appellant argues that his telephone call to an unnamed member of the Philadelphia Police Department requesting that no interrogation take place without a lawyer present, coupled with his unilateral acclamation that he had previously advised his client not to make any statements, is sufficient to exclude appellant's statements. Counsel attempts to buttress this argument with appellant's age at the time of the interrogation, 17 years and 9 months, a fact which, by counsel's own admission in the record, was unknown to him. This court stated in paragraph one of the syllabus of *State* v. *Stewart* (1964), 176 Ohio St. 156, that "[a] person who is less than 18 years old is not legally incapable of making a voluntary confession."

We accede to appellant's argument that an accused has a constitutional right to counsel, particularly at that stage of the investigation, however this is a right that can be waived. Even given appellant's age, no insurmountable barrier is constructed to a waiver of that right. (See *State* v. *Carder* (1966), 9 Ohio St. 2d 1, where the defendant was one year younger than appellant and his confession was ruled admissible.)

Appellant argues that the testimony involving the giving of the *Miranda* constitutional rights does not coincide with the facts in this case.

The record discloses the contrary. Detective Tom Jones of the Columbus Police Department who saw the appellant shortly after his arrest in Philadelphia and testified as follows:

"Q. Now, Officer, I'll hand you what's previously been marked for purpose of identification as State's Exhibit 41, and I'll ask you to look at that if you would please. Now, Detective Jones, I'd like to hand you again take a look at

what's been marked for purpose of identification, State's Exhibit 41, have you ever seen that exhibit before, sir?

"A. Yes, sir, I have.

"Q. Would you tell the court when you saw it?

"A. I saw this interview sheet at approximately 1:00 A. M. on the 14th day of May in Philadelphia, Pennsylvania.

"* * *

"* * * Now, was that read to this Defendant, John Harris in your presence?

"A. Yes, sir, it was.

"Q. And, then also on that page there are questions, can you read and write and things of this nature and answers yes or no, was that read in your presence?

"A. Yes, sir, it was.

"Q. Now, specifically on page 2, there are some seven typed questions. The first one reads that do you understand that you have the right to keep quiet and not—and do not have to say anything at all underneath that is written in ink the word, yes. Question number two, do you understand that anything you say can be used against you. Underneath that is written the word, yes. Three, do you want to remain silent. Underneath that is written, the word, no. Four, do you understand that you have the right to talk with a lawyer before we ask you any questions. Underneath that is written yes. Five, do you understand that if you cannot afford to hire a lawyer and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge. Underneath that is written in ink, yes. Six, do you want to talk with a lawyer at this time, or to have a lawyer with you while we ask you questions. Underneath that is written in ink, no. And, seven, are you willing to answer questions of your own free will, without force or fear and without any threats or promises having been made to you. Underneath that is written in ink is yes. Typed under that is statement of, and written in ink, is the name of John William Harris and the date 5-14-74. Now, the questions I have just read and appear typed on page two in State's Exhibit 41, were you present when those questions were read to John Harris?

"A. Yes, sir, I was.

"Q. Were you present when those questions were read to John Harris?

"A. Yes, sir, I was.

"Q. And the answers, whatever they may be, yes or no, were those answers written in your presence by the Defendant, John Harris?

"A. Yes, sir, it was.

"Q. And, the name, John William Harris, and the date, 5-14-74, was that signed by the Defendant in your presence?

"A. Yes, sir."

These questions and answers relative to appellant's educational and literal background are from State's Exhibit 41:

"Q. Can you read and write the English language, by that I mean can you read a newspaper without any trouble?

"A. Yes, I can.

"Q. How far did you go in school?

"A. I finished the 11th grade at Eastmoor Sr. High, in Columbus, Ohio.

"Q. Do you know why you have been arrested?

"A. Yes I do for the death of that woman and for

Detective Jones testified further that he saw the appellant again, some three hours later, at which time he again advised appellant of all his rights, permitted him to read them, and asked him if he understood them or had any questions concerning them. Appellant acknowledged his understanding and again affixed his signature. It was at this time that the following took place:

"Q. Would you tell the court if you requested him to do anything?

"A. Yes, sir, I asked him, after I advised him of his rights, if he'd be willing to write out the truth on his involvement in this homicide.

"Q. That's the only question that you asked him at that point?

"A. He said he would, right.

"Q. Did you procure any in any form by pencil and paper?

"A. Yes, sir.

"Q. Did you give it to him?

"A. Yes, sir.

"Q. And, then after you gave this to Mr. Harris, what if anything, did you do?

"A. Mr. Harris was in a room. I left the room. I proceeded maybe four or five feet from the doorway. I asked him if he would write this out, he stated he would. At this time, he began writing out his statement.

"Q. And, you had left the room, is that correct?

"A. That's right."

Appellant wrote, and the trial court admitted, the following:

"*On the Night it happen*

"Me and Jerome and Black and Legs went out to try to fine a ride because some Body had sold them some bad dope. and it was not any good. And they wanted to get there money back.

"So we the four of us went to see if we could get us a ride to go and find the man that sold the dope. So we went walking them and happen to run by St. Anthony hospiale into the lady that was killed. Jerome went up to her car and knocked on the window with a gun and the lady open the door and he told her to get in the back. And she said that she did not won't to do as he said but After a few words with her she got in the back set of her car. then we road around thinking of what to do with her. I my self drove the car and were I had took them they did not like the spot so we to a spot behind my house. Were Three of us had sex with the lady. Then Jerome & Black & Legs went to try and find the man that sold them the dope and when they were gone I took the lady to my house until they got back with the car and when Jerome came back the outher tow were not in the car. So we went to their house. and Jerome said that he wanted to kill the lady. So we took the lady to some woods were by Sunbury Rd. Jerome shot the lady and then I shot her and then we left to go take the tires off of the car and there was another dude they call beast. I left out something because he had sex with the lady to. So the dude named beast let me drive his car and Jerome drove the ladys car to a spot were we could take the tires off. beast said that he wanted 3 of the tires for his car. And we gave him all of them. Then the next thing

we know was that he had taken some Master Cards and tride to by some rings with them that is what we herd on the T. V. and they found out were he live at. and then we herd that the police were looking for us so we got some dude to bring us up here. And we got cot. And that my side of the story. Taylor Clark bought us to Philadelphia in his car. and drop us off.

"The abobe statement are the truth

"I have not been threatened

"I made these statement my self under my one free will."

professorial

While the foregoing may cause the elevation of some ~~professional~~ eyebrows over its prose, syntax and even grammar, the simple, clear, chronology of its grisly content is adequately related without any of the embellishments of academia.

Appellant cites the following cogent language from the case of *Coyote* v. *United States* (C. A. 10, 1967), 380 F. 2d 305, 308, to support his argument:

"What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. *The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights.*" (Emphasis added.)

We are convinced that the appellant was advised concerning his rights by his counsel prior to his arrest; that appellant was fully advised by the police at least two times prior to the statements; and that the spirit and meaning of the foregoing quotation was fully complied with. There is nothing in the record to indicate otherwise.

Appellant argues further that the enactments of the Ohio General Assembly which provide for the death penalty violate the rule set down by the United States Supreme Court in *Furman* v. *Georgia* (1972), 408 U. S. 238, and are unconstitutional under the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution. This argument has previously been resolved by this court in the case of *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and that ruling is adhered to.

Appellant contends that the manner in which indictments are brought provides for an unregulated level of prosecutorial discretion. Appellant sought to prove this premise at his trial by calling several witnesses, including two assistant county prosecutors. However, the record discloses no abuse of prosecutorial discretion by selective prosecution or discrimination against an individual defendant on a constitutionally impermissible basis. Counsel's reliance upon *Furman, supra*, in support of this contention is misplaced. That case condemned only the unfettered or uncontrolled sentencing discretion prevalent in death penalty statutes at that time.

Counsel maintains further that the Eighth Amendment precludes the application of the death penalty and the discretion of a juvenile judge in a transfer hearing pursuant to R. C. 2151.26. This proposition is rejected.

Counsel cites the case of *Commonwealth* v. *A Juvenile* (1973), 364 Mass. 103, 300 N. E. 2d 439, in support of his contention that a juvenile may not constitutionally be sentenced to death. This case involved a Massachusetts statute which provided that as to a juvenile tried as an adult and found guilty, if still under age 18 at the time of sentencing, the trial court had an absolute, uncontrolled discretion to still adjudicate the defendant a delinquent child. The court found the uncontrolled sentencing discretion constitutionally impermissible, not the application of the death penalty to a person under 18. The Ohio statutes contain

no similar provision. We conclude that the death penalty, where applicable, applies even-handedly to adults and juveniles tried as adults.

Appellant next argues that his due process rights were violated by the trial court in failing to determine whether his waiver of a jury trial and election of a three judge panel was knowingly, intelligently and voluntarily made. Although neither side disputes the right to waive a jury trial (see *Patton* v. *United States* [1930], 281 U. S. 276), the question is the manner in which that objective is accomplished. This issue was initially raised by the motion for a new trial when it was discovered that the written waiver of a jury trial was not in the court's file. The record shows that both counsel for appellant assumed that the other had obtained a written waiver. Attorney Schwartz, one of the defense counsel, in acknowledging the court's recollection of a pre-trial hearing concerning advising the assignment commissioner if there was to be a change requiring a jury venire stated, "No, there was no change in his mind."

At the hearing on the motion for a new trial, the court and counsel viewed a video tape involving the waiver. When it was concluded a member of the court said, "Well, the court did explain it. Stated to him, 'You have a right to trial by a jury.'" To which Schwartz responded: "That's the question this court has to decide." And the court replied: "And he waived this."

In addition to the pre-trial waiver, counsel for appellant again acknowledged appellant's desire to waive a jury trial in his opening statement. The video tape also reflects that counsel, in addition to the judge, advised the appellant of his right to a jury trial.

The court discovered the absence of the written waiver on that same day, but after it had returned its verdict. On that day, September 27, 1974, at that time, the appellant signed the waiver in open court.

The accepted standard for waiver of a constitutional right is an intentional relinquishment of that right. (See *Johnson* v. *Zerbst* [1938], 304 U. S. 458.) However there is no constitutional requirement that the waiver be in writing. Only, that it must be knowingly and intelligently made. (See *United States* v. *Ricks* [C. A. D. C. 1973], 475 F. 2d 1326.)

To resolve this question, we must look to Crim R. 23 (A) which contains the following language:

"In serious offense cases, the defendant before commencement of the trial may *knowingly, intelligently* and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. * * *" (Emphasis added.)

In the *Ricks* case the corresponding Federal Rule of Civil Procedure 23 was interpreted as being procedural:

and where the record clearly reflected a knowing, intelligent waiver by the accused, the lack of a written waiver did not upset the conviction. We accept this interpretation and hold that its application to this case and Crim. R. 22 (A), is parallel. The record in this case shows that from its pre-trial stage through the verdict it was clear that appellant and both of his counsel desired to waive a jury trial and submit the case to a panel. An entry dated September 9, 1974, almost two weeks prior to trial, by the administrative and presiding judge of the general division of the Franklin County Common Pleas Court, notes the appellant's waiver of a jury trial and makes the appointment of a three judge panel. That choice was not deviated from even after the verdict of guilty as charged was returned and the absence of a written waiver discovered. At that time, appellant reaffirmed his waiver by executing the written form that was countersigned by his counsel.

This court accedes that the better practice is to obtain a written waiver after fully advising a defendant of his right to a jury trial and accepting his "knowingly, intelligently, and voluntarily" made oral waiver on the record. However, the undisputed facts in this case militate against any error which the failure of said practice may create.

We are in agreement with appellee that "to reverse this conviction on such a narrow, hypertechnical point" would not be justified by reason or logic.

Appellant urges next that he did not receive a fair trial since all three of the judges did not participate in resolving questions of law presented at the trial. He argues that the presiding judge exercised complete dominion over objections raised by counsel during the course of the trial. Although the record discloses that one of the judges questioned his role in the proceedings, there is nothing to substantiate appellant's contention. There is no showing that at least a majority of the judges did not concur on all matters of law and fact. While the presiding judge frequently expressed the collective ruling of the court, the record discloses each of the other judges expressing both the view of the entire panel or his individual conclusion. In no instance, however, is there evidence of less than a majority concurring on a given ruling. All rulings reduced to writing were signed by the entire panel. We are unable to find any irregularity in connection with appellant's contention.

Finally, appellant maintains that the trial court erred by its failure to find that the offense was primarily the product of his mental deficiency under R. C. 2929.04(B)(3), which would have precluded the death penalty. It is significant to note at this juncture that there has been no complaint lodged at any time concerning the rejection of appellant's belated plea of not guilty by reason of insanity. Defense counsel apparently elected to assert the full thrust of this contention at the mitigation hearing.

R. C. 2929.04(B) states, in pertinent part:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when * * *

"* * *

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Counsel submits that appellant was a recognized socio-

path according to the doctors who examined him as well as by the two lower courts that passed judgment on him. We agree with this conclusion. However, we do not equate "sociopath" as being either a psychosis or a mental deficiency.

Both appellant and appellee refer to the American Psychiatric Association's Diagnostic and Statistical Codes for APA-ICDA Mental Disorders (2 Ed. 1971) to define and categorize the term "sociopath." The Codes list the antisocial personality under the category: Personality Disorders and Certain Non-Psychotic Mental Disorders. The reports of the examining psychiatrists appointed by the court pursuant to statute reveal no evidence that appellant was psychotic or suffered from any mental derangement.

Dr. Charles W. Harding concluded his report with the following:

"In conclusion I see no evidence of any psychosis or mental derangement, but consider him a sociopathic personality which in itself says that he has a lack of inhibitive personality traits exhibited by the average person. If drugs were used the inhibitive factors would be still less. His behavior during and following the alleged acts reveals evidence that he was aware of the nature of his acts and the probable consequences."

Dr. John H. Vermeulen stated:

"It is my opinion that John is not psychotic or mentally deficient, nor was he so at the time of the offense, in the meaning that is usually given to these terms. Being in touch with reality he is not psychotic. A diagnosis of antisocial personality usually is exclusive of mental illness, but his lack of feeling and the absence of a functioning conscience are to me indicative of a severe characterological defect. Again, borderline or low to average IQ are levels of intelligence above that of mental deficiency. * * *"

During the course of the trial a clinical psychologist testifying on behalf of the appellant attempted to establish that the acts of appellant were the result of a combination of drug and alcohol abuse. Unfortunately, there is no evidence to support that conclusion. Rather, the continuous thread woven throughout this case involves the search for some unknown person who had on some previous date sold some low content drugs to appellant and his friends. Nowhere in this record can it be established that appellant was under the influence of drugs on the night of May 8, 1974, and we wish to emphatically state this conclusion.

Based upon the reports and the entire record in this case we must agree with the previous conclusions of the trial court, as affirmed by the Court of Appeals, that there is no evidence of psychosis or mental deficiency of the appellant at the time of the commission of the crime. No mitigating circumstance as set forth in R. C. 2929.04(B) has been established by a preponderance of the evidence.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

EXHIBIT 1.

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COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

THE STATE OF OHIO, Plaintiff,

vs.

John William Harris
Defendant

September Term, 19 74

No. 74CR-07-1203

INDICTMENT Aggravated Murder, etc.

I John William Harris defendant in the above cause hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by ~~a judge~~ three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by a jury.

APPROVED:

Prosecuting Attorney

John W. Harris
Defendant

Counsel for Defendant

Judge

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"EXHIBIT 2"

APPENDIX

Name: John William Harris
D.O.B.: August 31, 1956
Date of Examination: September 16, 1974
Examiner: James Raia, Ph.D., Clinical Psychologist

John Harris was referred for psychological examination by the Franklin County Court and with the permission of his defense attorney, Mr. Marvin Schwartz. Mr. Harris has been detained in the Franklin County Jail since May 15, 1974, pending trial. He was examined in a conference room at the County Jail and was administered the Wechsler Adult Intelligence Scale (WAIS), the Bender-Gestalt and an extensive clinical examination including his social, family, school and employment histories. On September 4, 1974, Mr. Harris had been administered the Minnesota Multiphasic Personality Inventory (MMPI) by Jaime Smith e Incas, M.D., Psychiatrist, the results of which are included in this report.

It is John Harris' understanding that the charges pending against him include two counts of aggravated murder, kidnapping, rape, aggravated robbery and grand theft. He seemed both aware of and remorseful for his deeds, although he did not fully understand the legal derivation of all the indictments, particularly the second murder charge (claiming, "I don't know where the other one came from."), and the robbery charge. Since no other legal information was available at the time of the examination, the double murder count was presumed a mistake on Mr. Harris' part.

John was solemn, warm and candid throughout the rather long evaluation session and interview. He seemed genuinely open in his response to all questions, requesting only the right not to discuss the details of the crime for which he has been charged. The event seemed almost overwhelmingly repulsive to him, and it is tempting to conclude his use of repression as a coping mechanism. Such a temptation must be counterbalanced, however, with the judiciousness of his reservations at this time in the legal proceedings against him. John has been doing little else but "just sitting all day" alone in his cell since his apprehension in May of this year and has apparently spent much time in self-examination and reflection. He repeated to the examiners what he has apparently

already told his attorney: "I know I'm wrong. I feel I should be punished for what I done. I told my lawyer--whatever happens now just happens". John's manner was quiet, strangely passive and very cooperative. He did not exhibit the least bit of hostility, anger, nor even arousal; he maintained a tightly overcontrolled affect as he discussed in the same manner and tone all aspects of his past and recent life.

John related that he had never known his biological father, although his mother told him he drives a bus in Columbus and John said humorously that he looks at and wonders about all the drivers he sees. For a while John's stepfather, who fathered John's 10-year-old sister and 13-year-old brother and after whom John is named, lived with the family, but has been divorced from John's mother and apparently out of contact with the children for a while now. John seemed to enjoy his family, which includes his grandmother who lives with them and an aunt who lives locally. His mother, aunt and siblings visit him in the jail as often as restrictions allow, and his mother leaves money for John's limited needs. John says he is good to his family, although "they make me mad at times".

John apparently did not enjoy overwhelming academic success in school, although he reports that he had a lot of friends, male and female; he was retained once in elementary school and he dropped out after the 11th grade. Since that time, his employment history includes a part-time job at Buckeye Potato Chip Company and full time jobs in the dishroom at Nationwide Insurance Company and as a janitor for Ohio State University. He has been before the Ohio Youth Commission twice, 1969 and 1972, both times on charges of breaking and entering neighborhood homes for the purpose of robbery. He claims to have been guilty of the burgulary in 1969, but that the second charge in 1972 was only vengeance on the part of his next-door-neighbor, with whom John did not get along. As a result, the Youth Commission sent John to Maumee Camp in 1969 and to Fairfield in Lancaster in 1972-73, from where, in March of 1973 he obtained a furlough and did not return. After a year without trouble, John's probation officer merely said "they'd leave (him) out".

John attended art instruction while at Fairfield and states he enjoys drawing. He reported that his probation officer had been investigating entrance to the Air Force when John got into his most recent trouble, and that he could have had the opportunity to "take up a trade--maybe electronics or graphic arts". It seems that John had just begun to consider alternatives to his aimlessness and lack of direction.

The results of the administration of the WAIS show John to be functioning within the dull normal range. Although John worked hard at the WAIS and seemed to desire to do well, none of his subtest performances were particularly unusual or outstanding. The distribution of the subtest scores reflect little scatter and is fairly consistent suggesting this is a valid indication of his true ability. His Verbal Scale IQ was 87 and his Performance Scale IQ was 81, giving John a Full Scale IQ of 85. The intelligence test results surely reflect what must have been rather spotty formal education for a person of John's age.

From the Bender-Gestalt as well as from the other tests administered, there is no demonstrable evidence of neurological dysfunctioning. John approached this test with great interest and a strong desire to achieve. His performance revealed an exacting attention to detail and good immediate and remote memory as well as good fine motor coordination.

The test results from the MMPI on John Harris need be interpreted with extreme caution. The large number of bizarre answers within his protocol and the elevation of one of the validation scales could be indicating several testing difficulties including intellectual or reading problems, confusion, random answering or unconventionality. It is also possible that this examinee was attempting to exaggerate his problems. In such cases, it is difficult to interpret the isolated test results with much certainty.

The psychological profile presented through this test is of a withdrawn, inhibited individual who spends a good deal of time in personal fantasy and daydreams. Psychiatric patients with this pattern are frequently diagnosed as schizophrenic, paranoid type.

Characteristics of the symptoms of patients in this group are paranoid delusions, hallucinations, confusion, blunted and inappropriate affect, poor long-term concentration, shyness and withdrawal. Characteristic symptoms which might be anticipated are depression, irritability and extreme suspiciousness, although again it is cautioned that the conditions under which John took the test must be considered in any such interpretation.

Mr. Harris' test results are strongly suggestive of a major emotional disorder. Within the interpretive limitations outlined above, however, more exact translation is difficult. Comparative norms have never been constructed for persons in John's situation, and it is difficult to know what of the unconventionality, seclusiveness, distrust and withdrawal would be present outside of his current circumstances. It was also a source of confusion as to how the self-administered MMPI, albeit taken on a different day than the clinical interview, failed to complement the image of the quiet but affable and very cooperative person examined on September 16th. This latter demeanor, in turn, simply did not correspond to the personality manifestations expected of a person in Mr. Harris' position.

Clinical examination today, employing the Thematic Apperception Test (TAT) and selected potions of the Rorschach, however, did substantiate certain MMPI results: suspiciousness, paranoid delusions, inappropriate affect in sensitive and threatening situations, withdrawal under minimal pressure but attack under extreme pressure, and unrealistic optimism accompanied by indulgence in personal fantasies.

Mr. Harris' overall responses to this structured portion of the clinical examination give the diagnostic impression of sociopathology, APA coade 301.70, antisocial personality. His impulse control is pathologically impulsive causing trouble for himself and others. Similarly, his projected affect is overactively high and he appears inappropriately free of anxiety and guilt over wrong doings. These revealed aspects of his personality, impulsivity and heightened affect, undoubtedly played part in Mr. Harris' extreme acting-out behavior during his most recent criminal actions. His

use of drugs on the day of the crime, it seems, allowed for the extreme expression of his already potent impulsivity.

Mr. Harris demonstrated numerous underlying feelings of being threatened (especially in social and intense situations involving female authority figures), with the primary mechanism of coping being overt physical aggression. As noted in the results of the MMPI, in not so intensely pressured situations, he reacts by passivity and withdrawal. Considering that today's examination represented a less threatening situation to him, his quiet, passive behavior is understandable in view of these findings. It appears that Mr. Harris becomes aggressive only in the face of uncontrollable external pressure.

Throughout Mr. Harris' TAT themes, his characteristic relating style was manipulation (opposing) and overt aggression (demanding and attack). His major defenses are acting out, denial and externalizing. His perception of reality is complicated by his personal fantasies and is threatening and dangerous. He maintains an offensive guard against intrusion from others. Often this offensive guard takes the form of a superficial bravado and self-adequacy in attempt to hide a perceived impaired self-concept.

Mr. Harris' manipulative, sociopathic response style coupled with his paranoid delusions, suspiciousness, personal fantasies, etc., and his social history of drug abuse and his consort with "bad company" point to severe personality problems and psychological immaturity. Mr. Harris might have been able to pull his life together with psychological help and in a closely supervised and well structured setting. Instead, it seems, he was set up for his present situation by a combination of a low IQ, a history of failure in school, inability to secure a rewarding job, trouble with the law, inadequate social coping skills, vulnerability to the influence of others and a volatile temper, each of which compounded the others. His experience with drugs and alcohol seems to have been particularly explosive, and although according to John it remained short of diagnosed addiction, it apparently played a big part in the charges currently pending

against him. On the night in question, John was under the influence of cocaine and a mixture of hallucinogens and from what can be gleaned from the psychological examination it is estimated that John was not fully responsible for his actions at the time. He claimed himself not to have known exactly what had happened until he heard a report on the radio the following day. The truth of such a statement could not have been determined in the context of the examination conducted.

John has failed to develop a stable, independent and mature self-image. His drug and alcohol use proclivity, his susceptibility to the influence of others, his hostility, paranoia, bizarre thought content and disposition to rage are deeply rooted personality problems which can respond to psychological treatment. John's natural introspectiveness should be capitalized upon in a therapeutic setting which is carefully structured towards allowing him to develop a less manipulative and reality based life style. His delusions and personal fantasies must be dealt with on both the insight and behavioral levels. Mr. Harris needs to relearn the socialization process in terms of personally interacting with others in a non sociopathic manner. To insure a systematic and meaningful program of such treatments, a hierarchy of therapeutic and personal goals should be initially established.

James R. Raia, Ph.D.
Clinical Psychologist

JRR/vlk

Note 2. APPENDIX

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

STATE OF OHIO, :

Plaintiff, :

vs. : Case No. 74CR-07-1203

JOHN WILLIAM HARRIS, :

Defendant. :

- - -

AUDIO CASSETTE TRANSCRIPT OF VIDEO PROCEEDINGS BEFORE THE HONORABLE CLIFFORD E. RADER, JUDGE.

- - -

APPEARANCES:

Mr. Gordon Sroufe, Assistant Prosecuting Attorney,
On behalf of the Plaintiff, State of Ohio.

Mr. Myron Shwartz and Mr. Timothy D. Gerrity,
On behalf of the Defendant.

- - -

July 19, 1974

- - -

THE COURT: Mr. Sroufe?

MR. SROUFE: The Court please, this is case number 74CR-07-1203, State of Ohio, which is John William Harris.

Mr. Harris is in Court today with his counsel, Mr. Myron Shwartz and Mr. Tim Gerrity.

The Defendant has been indicted and arraigned for two counts of aggravated murder, one count of kidnapping, one count of rape, one count of aggravated robbery and one count of grand theft.

It is my understanding, after conferring with counsel, that the Defendant, at this time, wishes to waive the right that he has to have his case tried within ninety days of his arrest, and to have the case scheduled for trial on September 23, 1974.

The Defendant has signed an applic -- or an entry -- stating that upon application of the Defendant, in open Court, and for good cause shown, this case, on the record, is hereby scheduled for trial September 23, 1974. The Defendant hereby waives his right to be tried within ninety days of his arrest.

I'd like to inquire, if counsel agrees, at this time if the Defendant understands this right, and if

he has signed this entry.

MR. SHWARTZ: The matter has been explained to Mr. Harris and he does understand it. And he does -- has signed the entry.

THE COURT: Do you understand what Mr. Sroufe has said and what you've consulted with Mr. Shwartz about?

THE DEFENDANT: Yes.

THE COURT: And, it is your desire at this time to waive this ninety-day requirement for the case to be brought to trial. Because we can try it within the ninety days quite easily.

MR. SROUFE: Yes, sir, we can.

THE COURT: But if -- if my understanding is that it's your desire to go along with what Mr. Shwartz suggests that this September 23rd trial date is it -- ?

MR. SHWARTZ: That's right.

MR. SROUFE: Yes, sir.

THE COURT: Or 24th?

MR. SHWARTZ: September 23rd.

MR. SROUFE: September 23rd.

THE COURT: September 23rd trial date. The -- This is what you want?

THE DEFENDANT: Yes.

THE COURT: If that's satisfactory to you, that's what we'll do.

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MR. SHWARTZ: Thank you, Your Honor.

THE COURT: Now, how are we going to proceed? Do we call a special panel, or what?

MR. SROUFE: Yes, sir. At this time, it would be -- ah -- unless the Defense submits -- ah -- elects to proceed to a three-judge Court.

MR. SHWARTZ: We have -- We are anticipating, at this time, a three-judge panel. We have so notified the Assignment Commissioner. And they are making arrangements for that. We will prepare an entry signed by Mr. Harris waiving the jury and asking for a three-judge panel very shortly.

THE COURT: That is his desire --

MR. SHWARTZ: Yes.

THE COURT: -- after consultation with you, why, that -- that would, I'm sure, be within his rights.

MR. SHWARTZ: Yes.

THE COURT: But if we have to call a special jury panel, we would have to know fairly soon.

MR. SHWARTZ: Well, we will have the entry prepared within a week.

THE COURT: Very well.

Is there anything more that we should discuss today?

Ah -- The Court will state for the record that

it has appointed both you Mr. Shwartz, and you Mr. Gerrity, as counsel for Defendant, at his request.

Now I don't know that I see in here a request for appointment of counsel.

MR. SHWARTZ: Ah --

THE COURT: And it may be that that's loose in the papers somewhere.

MR. SHWARTZ: I at one time had such an entry. Let me check and see if I have one.

(There is some discussion between Mr. Shwartz and Mr. Van Gundy, Judge Rader's bailiff, concerning this form. The entire conversation is not clearly audible.)

- - -

(The following conversation is between Mr. Shwartz and the Defendant at the counsel table:)

MR. SHWARTZ: Now, what this says is that -- You -- You've signed one of these before -- That you don't have money to hire an attorney and want the Court to appoint counsel. Just sign right there.

- - -

MR. SHWARTZ: I am now presenting to the Court a request by Mr. Harris stating that he does not have funds -- to appoint him counsel.

THE COURT: Right. And response is to that, I have made this entry, which will be filed today, appointing

Myron Shwartz and Tim Gerrity.

MR. SHWARTZ: Thank you, Your Honor.

THE COURT: Would you gentlemen care to have copies of these papers as we file them?

MR. SROUFE: I would like to have that entry copied, sir. I --

THE COURT: I thought both of you would.

MR. SROUFE: -- I'll take it and --

MR. SHWARTZ: Will you get us a copy of it?

MR. SROUFE: Yes, and -- and then I'll file it.

MR. SHWARTZ: Okay.

THE COURT: All right. And here is the file.

MR. SROUFE: Okay.

THE COURT: Perhaps I should put my -- ah --

- - -

(There is conversation here between The Court, Mr. Shwartz and Mr. Sroufe which is not clearly audible. It concerns the case file.)

- - -

THE COURT: . . . terminate this hearing.

MR. SHWARTZ: Okay.

THE COURT: Correct?

MR. SROUFE: Thank you, sir.

MR. SHWARTZ: Yes.

THE COURT: All right.

MR. SHWARTZ: Thank you, Your Honor.

THE COURT: If, at any time anything further comes up, the Court's available.

- - -

Audio cassette transcript of video procedings prepared this date by Kathy Beecher.

Kathy Beecher

May 10, 1977

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-6951

JOHN WILLIAM HARRIS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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III. WHERE THE STATE HAS PROVED, BEYOND A REASONABLE DOUBT, ALL ELEMENTS OF THE CRIMINAL OFFENSE OF MURDER, INCLUDING AGGRAVATING CIRCUMSTANCES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED, MAY THE STATE, CONSISTENT WITH THE DUE PROCESS CLAUSE REQUIRE THAT THE EXISTENCE OF MITIGATING CIRCUMSTANCES BE ESTABLISHED BY A MERE PREPONDERANCE TO REDUCE THE PUNISHMENT?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-6951

JOHN W. HARRIS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition.

QUESTIONS PRESENTED

I. DOES THE DUE PROCESS CLAUSE OF THE CONSTITUTION MANDATE THAT WAIVER OF THE RIGHT TO TRIAL BY JURY BE ACCOMPLISHED IN WRITING?

II. DID THE COURTS OF OHIO ADEQUATELY CONSIDER THE NATURE, CIRCUMSTANCE, CHARACTER AND CONDITION OF BOTH THE OFFENDER AND THE OFFENSE IN FINDING NO MITIGATION WHICH WOULD PRECLUDE PETITIONER'S SENTENCE OF DEATH?

III. WHERE THE STATE HAS PROVED, BEYOND A REASONABLE DOUBT, ALL ELEMENTS OF THE CRIMINAL OFFENSE OF MURDER, INCLUDING AGGRAVATING CIRCUMSTANCES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED, MAY THE STATE CONSISTENT WITH THE DUE PROCESS CLAUSE REQUIRE THAT THE EXISTENCE OF MITIGATING CIRCUMSTANCES BE ESTABLISHED BY A MERE PREPONDERANCE TO REDUCE THE PUNISHMENT?

IV. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

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STATEMENT OF THE CASE

Petitioner and one James Jerome Royster were indicted by the Franklin County Ohio Grand Jury on a multiple count indictment charging aggravated murder with the specification that the murder was committed to escape detection in another offense and was in conjunction with aggravated robbery, rape and kidnapping; and counts of kidnapping, rape, aggravated robbery and theft. Two other individuals, Eric Maurice and Clarence Smith were indicted on all but the murder offense. Petitioner, represented by counsel, waived trial by jury and elected trial to a three judge panel. Following the verdict, a hearing pursuant to Section 2929.03, Ohio Revised Code, was held to determine existence of mitigating circumstances which would preclude imposition of the death penalty. No mitigating circumstances were found to exist. Petitioner's conviction and sentence of death were accorded full appellate review as of right by both the Ohio Court of Appeals and by the Ohio Supreme Court. Each level of appellate review affirmed both the conviction and sentence by unanimous decision. A motion for re-hearing in the Ohio Supreme Court was denied.

The offense occurred on May 8, 1974. The defendant and others, armed with a sawed-off shotgun, abducted an emergency room nurse from the parking area of a Columbus, Ohio hospital. After robbing the victim, petitioner and the others abducted her in her own car, taking her to petitioner's home. Petitioner raped the victim in his bedroom, then pushed her from the window. Additional rapes took place in an adjacent garage. Petitioner then forced the victim into the trunk of her car while the four assailants discussed her fate. Petitioner, concerned that Mrs. Nichols would be able to identify his home, argued that she should be murdered. Jerome Royster agreed. Smith and Maurice argued against the killing. Petitioner and Royster obtained shotguns and left with the

victim.

In a deserted area used as a dump, while Royster stood guard, petitioner shot Mrs. Nichols in the head with a .20 gauge shotgun. Both assailants then covered the body with a discarded couch and fled the scene and the state. Both were apprehended in Philadelphia, Pennsylvania some days later.

After full oral and written explanations of his constitutional rights as discussed by this Court in Miranda v. Arizona, 304 U.S. 436 (1966), petitioner stated he understood his rights, did not wish to have an attorney present and wished to make a statement. Thereafter, petitioner was given a pencil and paper and left alone. Petitioner wrote the statement set forth verbatim in the opinion of the Ohio Supreme Court, 48 Ohio St. 2d 349 at 356, 357. (The opinion is also set forth as an appendix to the petition.)

Before leaving the Philadelphia Corrections Center for return to Columbus, Ohio, petitioner was again advised of his rights orally and in writing and during the return trip, defendant further discussed his participation in the crimes.

Defense witness Dr. Raia testified that petitioner was within the adult normal range of intellectual functioning and suffered no neurological dysfunction. Because petitioner had claimed use of drugs and was an anti-social personality, Dr. Raia felt petitioner was unable to conform his conduct to the law. Dr. Smith e Incas felt petitioner suffered from pathological intoxication based on petitioner's claimed use of drugs. Neither doctor found any evidence of psychosis or mental defective disease.

Dr. Gere, chief psychiatrist of the Ohio Youth Commission found no evidence of acute psychosis mental illness and no evidence the petitioner was mentally defective.

Following the verdict, psychiatric reports were ordered for purposes of the mitigation hearing. Doctors Harding and Vermeulen found no evidence that petitioner was psychotic or suffered from mental derangement and both found

that petitioner's actions in his crime were rational and goal oriented.

No mitigation of the offense having been found, the petitioner was sentenced to death.

SUMMARY OF ARGUMENT

I. The Sixth Amendment guarantee of right of trial by jury may be knowingly and intelligently abandoned. No specific form of waiver is required. The record shows that after full consultation with counsel, petitioner did elect to waive trial by a jury.

II. The Courts of Ohio, both at trial and upon appellate review as of right, adequately considered both aggravating and mitigating circumstances of both the offense and the offender in arriving at petitioner's sentence. Included in such consideration of mitigation were the petitioner's social history, age, mental condition and personal characteristics. Petitioner was found to be not psychotic, not neurotic but merely to exhibit an anti-social behavioral pattern. Such findings do not preclude imposition of the death penalty.

III. Due process requires that the state establish each element of a criminal offense beyond a reasonable doubt. Once the existence of each element is so established and both the criminal offense of aggravated murder and aggravating circumstances are proved beyond a reasonable doubt, the state may require that circumstances mitigating the punishment must be established by a preponderance of evidence.

IV. The Ohio statutes provide for imposition of the death penalty only for the crime of aggravated murder and only

after aggravating circumstances are established beyond a reasonable doubt. The death penalty in Ohio is precluded unless no mitigating circumstances are shown. In the penalty phase of the Ohio procedure, circumstances of both the offense and the offender are taken into consideration so that the penalty is neither grossly disproportionate to the offense nor inflicted in an arbitrary or capricious manner. Full, statewide appellate review as a matter of right insures uniform application of the law so as to not offend any provision of the Constitution of the United States.

REASONS FOR DENYING THE WRIT

I(a) THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY MAY BE WAIVED BY AN INTENTIONAL RELINQUISHMENT OF THAT KNOWN RIGHT. SUCH WAIVER NEED NOT BE MADE IN WRITTEN FORM TO BE EFFECTIVE. THE RECORD WITHIN CLEARLY SUPPORTS SUCH WAIVER BY THE PETITIONER.

It is clear that the constitutional right to trial by jury may be waived. Patton v. United States (1930), 281 U.S. 276. The standard for waiver of a constitutional right is an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst (1938), 304 U.S. 458. However, there is no constitutional requirement that the waiver be in writing, if the waiver was intelligent, knowing and express. See United States v. McCurdy (1971), 450 F. 2d 283; United States v. Ricks (1973), 475 F. 2d 1326.

Federal Rule 23(B) requiring a written waiver of a full jury of twelve has been interpreted as a procedural rule and where the record clearly reflected a knowing, intelligent waiver by the accused, failure of the accused to sign the written waiver was found not to vitiate the conviction. Id. See also, Williams v. United States (1964), 332 F. 2d 36, cert. denied 379 U.S. 976, where it was held that the defendant's presence and acquiescence in an oral waiver of a jury of twelve made by his attorney in open court, was an

effective waiver binding on the defendant even though he did not affirmatively acquiesce. Accord. Horne v. United States (1969), 264 F. 2d 40, cert. denied. 360 U.S. 934. Nor is failure of the trial court to personally interrogate a defendant regarding a written jury waiver a constitutionally infirmity. Estrada v. United States (1972), 457 F. 2d 255, cert. den. 409 U.S. 858.

Where counsel expressed the desire of an accused to waive trial by jury in open court and the accused did not raise any issue with the procedure, waiver was held effective. See State v. Jelks (1969), 461 P. 2d 473, cert. denied 398 U.S. 966. As noted by the Supreme Court of Arizona in Jelks,

> "[w]e do not believe that justice is better served by sacrificing the time honored system of advocacy to the ritual of magic words.
>
> ". . .and that . . . .
>
> "[c]ounsel should not be relegated to the position of an unreliable mouthpiece."
> Id., at 475-476.

This is in accord with the overwhelming weight of authority. The fact that on the first day of trial appellant entered a plea of not guilty by reason of insanity is of no consequence as even appellant's expert witnesses found no evidence of psychosis or mental deficiency.

Contrary to petitioner's claim that the Ohio Courts did not review the constitutional question of waiver but focused solely on a procedural rule, (Petition, p. 8) each court, from trial to review by the Ohio Supreme Court, examined the record for a knowing, intentional relinquishment of the right to jury trial. Reference to the procedural aspects of an Ohio Rule of Criminal Procedure reflected the original thrust of appellant's argument regarding the waiver. (Parenthetically, we note that the unofficial transcript attached to the petition is not wholly accurate. The official video tape record, referred to by the trial court and the Ohio Supreme Court, reflects defense counsel conferring with the

defendant and stating ". . .You have a right to trial by jury . . . ." That counsel explained the right to jury trial was noted by the Ohio Supreme Court in its decision below. See 48 Ohio St. 2d 351 at 360.)

In thorough review of the record by the trial court, Court of Appeals and the Ohio Supreme Court, it was found that ". . .from its pre-trial stage through the verdict it was clear that appellant and both of his counsel desired to waive a jury trial . . . ." (Opinion below, 48 Ohio St. 2d 360, 361.

There was absolutely no indication to the contrary until the filing of a motion for new trial after the verdict. A valid waiver of trial by jury being demonstrated by the record, it is respectfully submitted that the Writ of Certiorari should not issue.

I(b) THE PETITIONER'S TRIAL PROCEEDED BEFORE A THREE JUDGE PANEL UPON WAIVER OF JURY TRIAL, WITHOUT IRREGULARITY.

As noted by the Ohio Supreme Court, regarding appellant's claim of irregularity in the proceedings, ". . .there is nothing to substantiate appellant's contention. *** We are unable to find any irregularity in connection with appellant's contention." (Opinion below, 48 Ohio St. 2d at 361.)

Accordingly, respondent respectfully submits that the Writ of Certiorari should not issue.

II. UNDER THE OHIO STATUTORY SCHEME, IMPOSITION OF THE DEATH PENALTY IS PRECLUDED IF MITIGATING CIRCUMSTANCES ARE SHOWN TO EXIST. THE SENTENCING COURT AND THE COURTS OF BOTH INTERMEDIATE AND FINAL APPELLATE REVIEW MUST CONSIDER THE NATURE, CIRCUMSTANCES, CHARACTER AND CONDITION OF BOTH THE OFFENSE AND THE OFFENDER IN DETERMINING IF MITIGATION IS PRESENT. NO MITIGATING CIRCUMSTANCES EXIST IN PETITIONER'S CASE.

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197, Section 2929.03, Ohio Revised Code, requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

"(B) Report

"The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B), Ohio Revised Code.

If a mitigating circumstance is shown to exist by a preponderance of the evidence, the penalty is life imprisonment. If no mitigating circumstance is found exist by a preponderance, the death penalty is imposed. Section 2929.03(E), Ohio Revised Code.

Section 2929.04(B), Ohio Revised Code, sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As previously noted, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the first case upholding the Ohio death penalty

statute, the court noted that this statute on mitigating factors, as with any legislation, may require judicial interpretation and clarification. Id., at 86. The court further noted that these mitigating factors were to be strictly construed in favor of the defendant to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods (1976), 48 Ohio St. 2d 127, 358 N.E. 2d 1059, the second branch of the syllabus (the law of the case, see Cassidy v. Glossip (1967), 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under Section 2929.04(B)(2), Ohio Revised Code. The court, in Woods, held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, (Id., at 135), and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Id., at 137, citing Williams v. New York (1949), 337 U.S. 241.

Likewise, in State v. Black (1976), 48 Ohio St. 2d 262, 358 N.E. 2d 551, in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was to narrow, the court stated that broadly defined and however evidenced, any mental state or incapacity may be considered in light of all the circumstances. Id., at 268.

In State v. Bell (1976), 48 Ohio St. 2d 270, 358

N.E. 2d 556, the court held that the age of the offender and prior criminal record are relevant facts to be considered in determining the existence of mitigating circumstances under Section 2929.04(B)(2) and (3), Ohio Revised Code. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency both minority and senility being relevant. Id., at 282.

Petitioner was examined both prior to trial and after verdict, by a total of five mental health professionals. All were in agreement that petitioner did not suffer from any psychosis or mental deficiency. Defense witness Dr. Raia was of the opinion that petitioner was within the adult normal range of intellectual functioning. In the opinions of defense doctors Raia and Smith e Incas, and because the petitioner claimed excessive use of drugs, he was unable to conform his conduct to the law. Yet, in the final review of the cause, the Supreme Court of Ohio stressed that:

> "Nowhere in this record can it be established that appellant was under the influence of drugs on the night of May 8, 1974, and we wish to emphatically state this conclusion." Opinion below, 48 Ohio St. 2d 363, Emphasis supplied.

Psychiatric evaluations by Doctors Harding and Vermeulen (described by defense counsel in the trial court as ". . .the two outstanding psychiatrists in the city . . . .") were received for purposes of the mitigation hearing. Both doctors found no evidence of psychosis or mental derangement and that petitioner's actions in his crime were rational and goal-oriented. Both described petitioner's behavioral characteristics as sociopathic or anti-social personality. Dr. Vermeulen noted that ". . .anti-social personality usually is exclusive of mental illness." (Opinion below, 48 Ohio St. 2d 363.)

Anti-social personality (formerly styled, sociopathic personality) is listed in Volume II of the Diagnostic and Statistical Manual of the American Psychiatric

Association. Under the general category of personality disorders, it is included as a behavioral pattern, not psychotic, not neurotic. Specifically, the anti-social individual is:

> ". . .grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or learn from experience . . . ."
> (DSM II, 301.7)

As indicated above, the Ohio statutory provisions for imposition of the death penalty are strictly construed in favor of the defendant. Broad consideration is given to the offender's history, character and circumstances under Rule 32.2(B) of the Ohio Rules of Criminal Procedure, Section 2929.03, Ohio Revised Code, and Section 2929.04, Ohio Revised Code. Age, circumstances and mental state were considered by the several examining psychiatrists, the sentencing and appellate courts. Under full review, no mitigation was found to exist. The fact that petitioner exhibits a pattern of selfish, callous and irresponsible behavior does not preclude imposition of the death penalty.

It is respectfully submitted that the Writ of Certiorari should not issue on this question.

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PRECLUDE THE STATE FROM REQUIRING THAT EVIDENCE OF MITIGATION OF PUNISHMENT BE DEMONSTRATED BY A MERE PREPONDERANCE OF EVIDENCE.

In Ohio, and specifically, in petitioner's case, the state was required to and did prove beyond a reasonable doubt both the elements of the crime of aggravated murder and the specific aggravating circumstances which allowed imposition of the death penalty. The Due Process Clause is not violated by then placing a burden upon the convicted felon to show by a mere preponderance, circumstances of mitigation. Patterson v. New York (1977), _____ U.S. _____, 97 S. Ct.; 21 Cr. L. Rptr. 3146. If it is constitutionally permissible to place a burden

of proof on a defendant in the case of an affirmative defense, certainly no due process bar is presented in the case of mitigation of sentence after conviction.

Petitioner alludes to a diagnosis of schizophrenia by Dr. Raia. (Petition, p. 14) We wish to correct the record. Dr. Raia did not diagnose petitioner as schizophrenic. Dr. Raia issued the caveat regarding the conditions of the examination, stating: "It is also possible that this examinee was attempting to exaggerate his problems." (Petitioner's appendix, Exhibit 2) Thereafter, Dr. Raia's diagnosis was anti-social personality, Diagnostic Code, 301.7. This was consistent with all other diagnostic opinions offered to the sentencing court.

Under authority of Patterson v. New York, supra., respondent urges that the Writ of Certiorari should not issue on this question.

IV. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENT, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punishment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

As separately discussed below, the death penalty in Ohio, as applicable to premeditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not grossly disproportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the

Eighth Amendment or violate the dictates of Furman v. Georgia (1972), 408 U.S. 238. Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion focusing on the offense and the offender.

As a constitutionally indispensible part of the process of inflicting the death penalty in the State of Ohio the circumstances, character and record of both the offense and the offender are considered in conformity with this Court's decisions last term in Gregg v. Georgia (1976), 428 U.S. 153; Proffitt v. Florida (1976), 428 U.S. 242; Jurek v. Texas (1976), 428 U.S. 262; Woodson v. North Carolina (1976), 428 U.S. 280; and Stanislaus Roberts v. Louisianna (1976), 428 U.S. 325.

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, and as more fully set forth below, the respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment may be imposed is aggravated murder (Section 2903.01, Ohio Revised Code). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 Ohio Revised Code), and other states.

That statute provides:

> "Sec. 2903.01(A) No person shall purposely, and with prior calculation and design, cause the death of another.

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burlgary, or escape.
>
> "(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A), Ohio Revised Code, as follows:

> "Sec. 2901.22(A) . A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A), Ohio Revised Code, is alleged in the indictment, the penalty for aggravated murder is life imprisonment. See Section 2929.03(A) and 2941.14(B), Ohio Revised Code.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A), Ohio Revised Code, must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See Section 2941.14, Ohio Revised Code.

The aggravating circumstances are as follows:

> "The offense was the assassination of the President of the United States or a person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice-president-elect of the United

States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Two of the agggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiannna (1977), _____ U.S. _____, 97 S. Ct. 1993.

The remaining five aggravating circumstances consider the nature, status, character, or record of both the

offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilt as to an aggravating circumstance.

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding judge at a jury trial, or the three judge panel if the jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197, Section 2929.03(D), Ohio Revised Code requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

> "(B) Report
>
> "The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may

> be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement ot the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D), Ohio Revised Code.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B), Ohio Revised Code.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E), Ohio Revised Code.

4. Mitigating Circumstances

Section 2929.04(B), Ohio Revised Code, sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Id., at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods (1976) 48 Ohio St 2d 127 358 N.E. 2d 1059, set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under Section 2929.04(B)(2), Ohio Revised Code The court in Woods held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced. (Id., at 135), and the nature and circumstances of the offense, the history character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Id., at 137, citing Williams v. New York (1949) 337 U.S. 241

Likewise, in State v. Black (1976), 48 Ohio St. 2d

262, 358 N.E. 2d 551, in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Id., at 268.

In State v. Bell (1976), 48 Ohio St. 2d 270, 358 N.E. 2d 556, in the second branch of the syllabus, the Court held that the age of the offender and prior criminal record are relevant facts to be considered in determining the existence of mitigating circumstances under Section 2929.04(B)(2) and (3), Ohio Revised Code. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency both minority and senility being relevant. Id., at 282.

Thus, it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender.

This procedure complies with the Eighth Amendment and the dictates of this Court's decisions last term, with the Ohio procedure closely analogous to the procedure upheld in Proffit, supra., and Jurek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty eight counties, is the court with general and subject matter

jurisdiction in aggravated murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV, Section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(iii), Ohio Constitution.

Thus, an aggrieved defendant in a capital case, as a matter of right, may have both his conviction and sentence reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case.

> "[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges.
> Id., at 86.

Respondent would note that the explicit quidelines contained in the statutory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller (1977), 49 Ohio St. 2d 198, N.E. 2d 419 at 204:

> "This state wide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

For each of the foregoing reasons, previously stated, the respondent, State of Ohio, respectfully submits that the imposition of capital punishment, under the statutory procedures, of Ohio do not offend the Eighth Amendment. We urge that the writ should be denied.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon Timothy D. Gerrity, Esquire, counsel for the petitioner, by mailing same to his office at 88 East Broad Street, Columbus, Ohio 43215; by United States Mail, postage prepaid, this 15TH day of July, 1977, and upon Myron Shwartz, Esquire, counsel for the petitioner, by mailing same to his office at 50 West Broad Street, Columbus, Ohio 43215, by United States Mail, postage prepaid, this 15TH day of July, 1977. I further certify that all parties required to be served have been served.

Alan C. Travis

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

UNITED STATES CONSTITUTION

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

ARTICLE IV, SECTION 3

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modity, or reverse judgments of final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders of actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict

with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(c) Laws may be passed providing for the reporting of cases in the court of appeals.

ARTICLE IV, SECTION 2

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessray to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;
(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

OHIO REVISED CODE, SECTION 2901.22

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantialy lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or void a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence sufficies to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

OHIO REVISED CODE, SECTION 2903.01

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediatley after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

OHIO REVISED CODE, SECTION 2929.02

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

OHIO REVISED CODE, SECTION 2929.03

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A)of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which maybe the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the

specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel, submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

OHIO REVISED CODE, SECTION 2929.04

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The Offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law

enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediatley after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REVISED CODE, SECTION 2941.14

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating

circumstances is specified to an indictment or count each shall be in a separately numbered specification, and if an aggravating circumstances is specified to a count in an indictment containing more than one count such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at th end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, Specification 1, or, Specification to the First Count, or, Specification 1 to the First Count). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in division (A)(1) to (7) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same.)

OHIO RULES OF CRIMINAL PROCEDURE, RULE 23

In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

(B) In felony cases juries shall consist of twleve. In misdemeanor cases juries shall consist of eight.

(C) In a case tried without a jury the court shall make a general finding.

OHIO RULES OF CRIMINAL PROCEDURE, RULE 32.2

(A) In felony cases the court shall, and in misdemeanor cases may, order a pre-sentence investigation and report before granting probation.

(B) The report of the presentence investigation shall state the defendant's prior criminal record the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present physical and mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental

examination of the defendant.

(C)(1) Except in cases of aggravated murder committed on and after January 1, 1974, the report of the presentence investigation shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.

(2) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.

(3) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court, probation officer or investigator immediatley following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney.

(D) If the defendant is committed to an institution or placed under custodial care or treatment under the supervision of governmental agency, the court shall forward to the institution or custodian a copy of the report of any presentence investigation and any mental or physical examination, together with the entry of commitment or other appropriate entry. In addition, if the defendant is committed to a penal or reformatory institution, the court shall forward a statement of the number of days confinement which the defendant is entitled by law to have credited to his minimum and maximum sentence.

OHIO RULES OF APPELLATE PROCEDURE, RULE 5

After the expiration of the thirty day period provided by Rule 4(B) for the filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave to appeal shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and a file a copy of the notice of appeal in the court of appeal. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.